SAM PENG THONG & ORS

v.

TETAP MERIAH SDN BHD (NO 2)

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CIVIL SUIT NO: 22-247-2001]
1 AUGUST 2001

CIVIL PROCEDURE: *Injunction - Stay of - Application for - Principles governing such application*

This is the defendant's application for a stay or a limited stay on the interlocutory injunction dated 21 June 2001 (the injunction) pending its appeal to the Court of Appeal. The injunction was issued following a notice of intention from the defendant to cease operation of the Pacific Mall (the complex). The injunction enjoins the defendant to maintain the operation of the complex. In their application for stay the defendants have offered limited services. As an alternative to the limited services, the defendants offered to relocate at their expense, the plaintiffs to the ground floor of the complex.

The defendant's reasoning is that in the face of its impecuniosity the injunction is incapable of being reasonably performed in that it would result in the defendant not only being rendered insolvent but arising therefrom the defendant would be found in contempt of the said order and these being matters that flow from the granting of the injunctive order and hence an important ground for consideration in the context of the stay application herein.

The plaintiff in reply to the hardship argument by the defendant argued that such hardship was self-inflicted and as such not a ground for the defendant to avoid its contractual obligation.

Held:

[1] It is settled law that the granting of a stay of an injunction is a matter of the court's discretion and the exercise of such discretion must be founded on established judicial principles. The factors to consider are (a) whether the balance of convenience lies in favour of the applicant; (b) whether the appeal will be rendered nugatory; (c) whether the applicant has an arguable appeal. (p 670 a-b)

[1a] The paramount consideration in the exercise of the judicial discretion is to ask whether justice would be served by withholding or acceding to the application for the stay, which party will suffer greater hardship if the stay is refused. (p 672 g-h)

[2] The defendant's business was not only confined to the building and selling but also the continuous maintenance of the complex and it was in respect of the business of maintaining the complex that the defendant now has "to make decisions under a sword of damocles which may descend if the way the business is run does not conform to the terms of the order" should the stay order not be granted. (p 673 f)

[2a] The injunction has resulted in an oppressive effect which would wreak undue and untold hardship on the defendant if it is not postponed. (p 673 b-c)

[Application allowed.]

Case(s) referred to:

Alexander v. Cambridge Credit Corp Ltd [1985] 1D ACLR 42 ***(refd)***

Cooperation Insurance Society Ltd v. Argyll Stores (Holdings) Ltd [1998] AC 1 ***(refd)***

Dickson Trading (S) Pte Ltd v. Transmarco Ltd [1989] 2 MLJ 408 ***(refd)***

Erinford Properties Ltd & Anor v. Cheshire County Council [1974] 1 Ch 261 ***(refd)***

Government of Malaysia v. Datuk Hj Kadir Mohd Mastan & Anor Application [1993] 4 CLJ 98 ***(refd)***

Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-pekerja Ladang Bhd: Tetuan Isharidah, Ho, Chong and Menon (Garnishee) [2000] 3 CLJ 361 ***(foll)***

Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 ***(refd)***

Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 ***(refd)***

Lim Kok Liam & Sons Sdn Bhd v. Lau Choon Wan (Leong Yok Chin Intervener) [1996] 4 CLJ 256 ***(refd)***

Minnesota Mining & Manufacturing Company v. Johnson & Johnson Limited [1976] 139 FSPLR ***(refd)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(refd)***

Street Patent Law Reports [1976] 139 ***(refd)***

Mohd Mustafa v. Kandasami (No 2) [1979] 2 MLJ 126 ***(foll)***

Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd [1989] 2 CLJ 142; [1989] 1 CLJ 154 ***(refd)***

For the plaintiff - Chang Tau Sian; M/s Henry Soong & Chang

For the defendant - Benjamin John Dawson (Wong Kok Leong); M/s Nik Hussain & Partners

Reported by Mariette Peters-Goh

JUDGMENT

Syed Ahmad Helmy JC:

This is the defendant's application for a stay or a limited stay of the interlocutory injunction dated 21 June 2001 ("the injunction") pending its

appeal to the Court of Appeal ("the appeal"). The appeal was filed on 25 June 2001. There is in addition an application for clarification of the terms of the injunction.

The injunction was issued following a notice of intention from the defendant to cease operation of the Pacific Mall ("the complex"). The injunction enjoins the defendant to maintain the operation of the complex.

In their application for stay the defendants have offered the following terms as consideration for the stay:

a) water supply to the complex

b) security for the complex

c) lif service for the 1st and 2nd floor of the complex

d) electricity supply to Unit No. 2.62 at 2nd floor of the complex

e) ingress and egress to the units through the entrance as specified

f) electricity supply to Unit No. 2.62 and the surrounding areas of the 2nd floor as specified

g) installation of two (units) of split unit air-conditioners in Unit No. 2.62 on the 2nd floor.

As an alternative to the aforesaid limited services the defendants are offering to relocate at their expense all the plaintiffs (except the 3rd plaintiffs) to the ground floor of the complex to a unit of equivalent size and in a comparatively better location facing the main road, complete with two units of air-conditioners each and the provision of electricity and water supply together with security services.

The alternative proposals aforesaid according to the defendants are intended not to disrupt the plaintiff's business activities and would have manifold benefits in not only meeting the mischief of the injunction but also does not prejudice the plaintiffs as well as keeping the costs of maintenance down to a bearable figure.

The defendants reasoning is that in the face of its impeciunosity the injunction is incapable of being reasonably performed in that it would result in the defendant not only being rendered insolvent but arising therefrom the defendant would be found in contempt of the said order and these being matters that flow from the granting of the injunctive order and hence an important ground for consideration in the context of the stay application herein.

In support of the defendants contention aforesaid they have exhibited the entire list of creditors and its yearly accounts including the breakdown of the cost and expenses to maintain the complex and the collection received which exhibits are marked as TM21 and TM22 in encl. 27. From the accounts submitted there is an outstanding sum of RM197,776.15 due and owing to Tenaga Nasional Berhad and RM1,637,009 to the local council as at 30 June 2001 which claims remains outstanding.

The sorry state of their financial position would, it is urged by the defendant result in a situation where the defendant would be exposed to contempt proceedings arising from their inability to perform the injunction. The grave consequences of committal proceedings has brought on an oppressive effect resulting in undue and untold hardship beyond the contemplation of the court and disproportionate hardship on the defendants.

The plaintiff in reply to the hardship argument advanced by the defendant argued that the defendants' hardship is self inflicted and was such as not a ground for the defendant to avoid its contractual obligation and relied on the Supreme Court case of *Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd* [1989] 2 CLJ 142; [1989] 1 CLJ 154. The plaintiffs argument is premised on the contention that it is too convenient for the defendant to enter into a contract, then trade itself to insolvency and when met with an action to enforce the contract puts up the hardship element. The plaintiff contends that the defendant's own balance sheet in "TM22" of encl. 27 does not indicate in any way whatsoever that the defendant's financial difficulties are caused by the plaintiff's failure in paying the maintenance charges – the difficulties are primarily caused by its own borrowings.

From the respective contentions of the parties it is clear that the primary issue for determination is whether post injunctive financial hardship is a ground for the court to grant a stay.

In approaching the determination of the issue aforesaid I am not oblivious to the fact that an injunction being a form of equitable relief can in appropriate circumstances in the exercise of the courts discretion be tempered by equitable principles.

Undoubtedly prejudice would be suffered by both parties as a complete continuance of the injunction in its present form would only benefit the plaintiffs just as an unconditional stay may benefit only the defendant.

In short it calls for balancing exercise (*Lim Kok Liam & Sons Sdn Bhd v. Lau Choon Wan (Leong Yok Chin Intervener)* [1996] 4 CLJ 256) and the court powers is unfettered – *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701.

It is only appropriate at this juncture to allude to the special circumstances requirement as propounded by our local courts which is inherent for a successful stay application.

The expression special circumstances does not mean very special or exceptional or peculiar circumstances but is a term to devote a combination of certain determining factors that are demonstrated by affidavit evident to persuade the court that it is a just and appropriate case to grant a stay of execution in the circumstances – *Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-pekerja Ladang Bhd: Tetuan Isharidah, Ho, Chong and Menon (Garnishee)* [2000] 3 CLJ 361.

The list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. As long as one does not stray beyond the perimeter set by judicial principles, the discretion can be exercised – *Government of Malaysia v. Datuk Haji Kadir Mohd Mastan & Anor Application* [1993] 4 CLJ 98.

On stay being founded on the court's discretion Abdul Hamid J (as his Lordship then was) in *Mohd Mustafa v. Kandasami (No 2)* [1979] 2 MLJ 126 at 127 had this to say:

> On the question of stay of execution, it is I think settled law that the granting of such a stay is a matter of the Court's discretion, and it is true that the exercise of such discretion must be founded on established judicial principles. One of the determining factors that calls for consideration is whether by not making an order to stay the execution it would make the appeal if successful, nugatory in that it would deprive the appellant of the results of the appeal. How pertinent that factor would be vary according to the circumstances of each particular case.

The question arises – what are the combination of determining factors? The answer to the question can be found in *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161 and *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299.

Upon evaluating the respective Supreme Court and Court of Appeal decisions aforesaid the common thread that runs through them is that both courts adopted and accepted the three core ingriedients propounded by the New South Wales Court of Appeal in *Alexander v. Cambridge Credit Corp Ltd* [1985] 1D ACLR 42 which is necessary to move the court's discretion in granting stay. The three core ingriedients are:

1. Where the "balance of convenience" lies in favour of the applicant.

2. Where the appeal will be rendered nugatory.

3. The applicant has an arguable appeal.

Depending on the peculiar facts and circumstances of the case the application of the three core ingriedients may be made with some variations and invariably implicit in the core ingriedients is the factor of justice.

Having established the necessity of the presence of the three core ingredients the approach to be adopted in evaluating the stay application herein is put in perspective and I have to determine the existence of the core ingredients to favourably dispose my discretion towards a stay, but not otherwise.

In this connection it is pertinent to emphasise that the injunctive order herein being an interlocutory order and not a final order have not finally determined or disposed off the rights of the parties and as such it is inappropriate to say that the order is akin to a final judgment in the manner of a final perpetual injunction or a final judgment for payment of monies where the rigours of special circumstances is a prerequisite. To apply the full rigours of the three core ingriedients in the special circumstances test without variation in the factual matrix of the case at hand would be inappropriate. As was stated by Chan Sek Keong JC (as his Lordship then was) in *Dickson Trading (S) Pte Ltd v. Transmarco Ltd* [1989] 2 MLJ 408 at p. 415:

> Both the *Serangoon Garden* case and the *Sijankat Berpakat* case concerned applications for stay of execution of final judgments after full trials. The present application was in effect a stay of an interlocutory order. In my view, there is a difference in substance and not merely in degree between the two situations.

Hence the variable approach should be one for the preservation of the status quo where the paramount consideration is whether justice would be served if the stay is granted more so on the ground of hardship caused subsequent to the injunction.

The preservation of the *status quo* approach was established by Megarry J in *Erinford Properties Ltd & Anor v. Cheshire County Council* [1974] 1 Ch 261 at pp. 267 and 168.

> On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one upon which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be

wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the *status quo* pending the appeal.

Closer to the issue at hand is the Court of Appeal case of *Minnesota Mining & Manufacturing Company v. Johnson & Johnson Limited, Fleet Street Patent Law Reports* [1976] 139 which turned on the issue whether the defendants were entitled to protection of a stay order against the consequences of the injunction pending appeal Buckley LJ at p. 144 made an illuminating statement:

It is not in dispute that where a plaintiff has at first instance established a right to a perpetual injunction, the court has a discretion to stay the operation of the injunction pending an appeal by the defendant against the judgment. On what principles ought such a discretion to be exercised? The object, where it can be fairly achieved, must surely be so to arrange matters that, when the appeal comes to be heard, the appellate court may be able to do justice between the parties, whatever the outcome of the appeal may be. Where an injunction is an appropriate form of remedy for a successful plaintiff, the plaintiff, if he succeeds at first instance in establishing his right to relief, is entitled to that remedy upon the basis of the trial judge's findings of fact and his application of the law. This is, however, subject to the defendant's right of appeal. If the defendant in good faith proposes to appeal, challenging either the trial judge's finding or his law, and has a genuine chance of success on his appeal, the plaintiff's entitlement to his remedy cannot be regarded as certain until the appeal has been disposed of. In some cases the putting of an injunction into effect pending appeal may very severely damage the defendant in such a way that he will have no remedy against the plaintiff if he, the defendant, succeeds on his appeal. On the other hand, the postponement of putting an injunction into effect pending appeal may severely damage the plaintiff. In such a case a plaintiff may be able to recover some remedy against the defendant in the appellate court in respect of this damage in the event of the appeal failing, but the amount of this damage may be difficult to assess and the remedy available in the appellate court may not amount to a complete indemnity. It may be possible to do justice by staying the injunction pending the appeal, the plaintiff's position being suitably safeguarded. On the other hand it may, in some circumstances, be fair to allow the injunction to operate on condition that the plaintiff gives an undertaking in damages or otherwise protects the defendant's rights, should he succeed on his appeal. In some cases it may be impossible to devise any method of ensuring perfect justice in any event, but the court may nevertheless be able to devise an interlocutory remedy pending the decision of the appeal which will achieve the highest available measure of fairness. The appropriate course must depend upon the particular facts of each case.

From the two cases aforesaid the exercise of the court's discretion would not only have to take into consideration the nugatory ingredient but the justice element and its prejudicial effect on the parties. The nugatory ingredient though not exclusive or singular nevertheless is an essential condition for consideration and cumulatively with the other ingredient and the justice element would be a crucial factor in determining whether the discretion of the court tilts in favour of the defendant.

Though in determining the stay application I must proceed on the assumption that the earlier injunctive order given by me is correct nevertheless I must not be oblivious that by reason of the appeal mechanism the plaintiffs entitlement to his injunctive remedy cannot be regarded as certain until the appeal has been disposed off. On the question of certainty I cannot disregard the defendant's averment of non-payment of service charges by the plaintiffs which averment would have a direct bearing on the question of breach of interdependent obligations under the respective sale & purchase agreement & deed of mutual covenants and the ability and worth of the plaintiffs to honour the undertaking as to damages given in respect of the injunction. The question of certainty or otherwise of the entitlement to injunctive relief would invariably involve the determination by the appellate court of the question whether a party who fails to discharge their contractual obligation of payment of service charges would be in a position to restore the defendant to his original position for the substantial cost of operation of the complex through the mechanism of an untested undertaking as to damages should the appellate court decide in the defendant's favour. It is in this context that to refuse a stay may surely damage the defendant in such a way that he will have no remedy against the plaintiff if he succeeds on the appeal and makes his appeal nugatory. Again the postponement of putting the injunction into effect could cause damage to the plaintiff.

In accordance with the dictates of a balancing exercise and taking into consideration the presence of the aforesaid factors of the three core ingredients and the interlocutory nature of the order, I am of the considered view that the paramount consideration in the exercise of the judicial discretion conferred on me is to ask the pertinent question – whether justice would be served by withholding or acceding to the application for stay or as the defendant puts it – which party will suffer greater hardship if the stay is refused?

Turning to the evidence herein the defendant has succeeded in persuading me through their financial statements and the breakdown in the cost of maintenance *vis-a-vis* the collection that the injunction will result in disproportionate and exceptional financial burden to maintain the complex and extreme hardship and anxiety in terms of the prospect of committal

proceedings. Though I do not deny by putting the injunction on hold the plaintiff would suffer hardship *vis-a-vis* their investment nevertheless in applying the balancing exercise such hardship does not overweigh the hardship suffered by the defendants as a consequence of the injunction which clearly leads me to conclude that the defendant will be the party who will suffer greater hardship if the stay is refused.

The injunction, beyond the contemplation of the court has resulted in an oppressive effect which would wreak undue and untold hardship on the defendant if it is not postponed. As was described by Lord Hoffman in *Cooperation Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* [1998] AC 1 at p. 13:

> The prospect of committal or even a fine, with the damage to commercial reputation which will be caused by a finding of contempt of court is likely to have undesirable consequences - the defendant, who *ex hypothesi* did not think that it was in his economic interest to run the business at all, now has to make decisions under a sword of Damocles which may descend if the way the business is run does not conform to the terms of the order.

Though it is true that the obligation herein is unlike the obligation in *Argyll*'s case above which relates to the carrying on of the business of supermarket by the tenant, nevertheless the main thrust behind *Argyll*'s case is not the nature of the business but rather the various consideration that the court must take into account in relation to the issuance of injunction which requires the performance of a continuous act. In the context of the case at hand one should not lose perspective that the defendants business is not only confined to the building and selling but also the continuous maintenance of the complex and it is in respect of the business of maintaining the complex that the defendant "now has to make decisions under a sword of damocles which may descend if the way the business is run does not conform to the terms of the order" should the stay order not be granted.

The stay order herein would fairly achieve the objective by preserving the *status quo* so that when the appeal comes to be heard, the appellate court may be able to do justice between the parties whatever the outcome of the appeal may be.

In the circumstances encl. 22 is allowed and the injunctive order dated 21 June 2001 is hereby stayed subject to the terms that the defendant herein at their own expense relocate all the plaintiffs (with the exception of the 3rd plaintiffs) who are interested in carrying out and/or continuing their business to units of equivalent size at the ground floor facing the main road of the complex with the provision of two units of air-conditioners in each of the respective units together with electricity and water supply and security

facilities. The electricity and water charges consumed by the plaintiffs shall be borne by them and the payment of service charges shall be suspended until final determination of same at the trial of this action.

The stay order herein shall stand until the determination of the appeal in respect of the injunctive order dated 21 June 2001 by the Court of Appeal and the parties are given liberty to apply and the costs herein shall be costs in the cause. As regards the 3rd plaintiff herein there shall be an unconditional stay of the injunctive order dated 21 June 2001. I also order an early trial of the action herein.